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NO. 91-510

Supreme Court of the United States

October Term, 1991

Patsy O. Tiffany
Administratrix and Personal Representative
For the Estate of Henry H. Tiffany, Deceased,
Petitioner,

v.

United States of America
Respondent,

v.

Brandon Ladd Corporation
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner seeks to review a decision of the Court of Appeals for the Fourth Circuit which holds that separation of powers principles bar redress against the Government for violations of Air Force regulations and procedures that caused a midair collision with a civilian aircraft in peacetime. The court of appeals' decision raises important constitutional issues defining the scope of the separation of powers doctrine, principles of justiciability, and the limits of the Government's waiver of sovereign immunity under the Suits in Admiralty Act and the Federal Tort Claims Act. In our petition, we showed that the court of appeals departed from the established procedure of analyzing Governmental negligence in terms of discretion, and thus was in conflict with decisions of this Court and decisions of the Third, Eighth, and Ninth Circuits. In

addition, we showed that the Governmental immunity created by the court of appeals would displace the combatant activities exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(j), in its entirety, rendering the exception meaningless.

The United States' brief in opposition does not dispute that the court of appeals avoided discretionary function analysis as the grounds for its decision. Nor does it deny that the scope of military immunity created by the court of appeals exceeds the scope of immunities that are available by reason of discretionary function or under the combatant activities exception of the FTCA. However, the Government belittles the significance of the circuit court's departure from established precedent. The Government asserts that "petitioner repeatedly overstates the scope of the court of appeals' holding" (Opp. at 7), that the court of appeals' decision was "consistent with decisions of this Court and of other courts of appeals" (*Id.*), and that further review is unnecessary because "the court's holding was limited to the unusual facts of this case" (Opp. at 8). We reply briefly to these assertions here.

1. The Court of Appeals' Holding Was Not Premised on any Unique or Unusual Circumstances.

The Government portrays the intercept in suit as a "quintessentially military mission" (Opp. at 7) involving "actions taken in actual military defense of our country" (Opp. at 8, quoting Ct. of App. Op., Pet. App. at A-11). The importance of the mission purportedly invokes special constitutional considerations. The Government argues that the intercept "is not properly subject to judicial review," (Opp. at 7), because "the judiciary should be particularly reluctant to review the propriety of military operations" (Opp. at 8). Paradoxically, the Government also suggests that the case should be of little concern to this Court because the gravity of the intercept mission sets it apart from routine military activities and diminishes its value as precedent. The Government argues that this case "involves a highly unusual tort claim," (Opp. at 7), and that the holding was "limited to the unusual facts of this case, the adjudication of which

involves an exceptional intrusion into military matters'' (Opp. at 8).[1]

Neither the facts in the record nor the scenario proffered by the court of appeals justifies these assumptions. As we noted in our petition, there was no evidence that a combat situation was ever anticipated or expected. (Pet. at 5, n. 6.) Indeed, the regulations promulgated to the civilian pilots emphasized that peacetime identification intercepts were ''vastly different than those conducted under increased states of readiness.'' *Id.* Moreover, the very existence of regulations requiring 1000 feet of vertical separation and a limited overtake speed during intercepts suggests that the discretion of the pilots was purposefully limited in order to prevent them from confusing the high level of prudence required in a peacetime intercept situation with the greater risks appropriate to a combat situation.

Furthermore, although the court of appeals made frequent reference to the military importance of the intercept, its holding was in no way limited to the ''unusual facts'' that the Government now perceives. On the contrary, the court expressly declared that ''The elementary canons of judicial caution are not limited to actions taken during actual wartime, but *may extend to many other aspects of military operations.*'' (Pet. App. at A-13, emphasis added.) Indeed, the court of appeals only grudgingly tried to distinguish contrary precedent by observing that national defense interests ''may be more remote'' when the military is conducting training exercises or acting in the civilian arena. (Pet. App. at A-16.)

The danger of the court of appeals' reasoning is that, contrary to the Government's assertion, there is no logical way to distinguish the circumstances of Henry Tiffany's death from

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1. In promoting the military importance of the intercept mission, the Government more than once attributes fault to Tiffany that is inconsistent with the district court's findings of fact. Thus, the Government asserts that Henry Tiffany ''unlawfully entered the Air Defense Identification Zone'' (Opp. at 2) and asserts that Tiffany invited the collision by ''knowingly failing to give the notice (filing a flight plan) that would have made clear his civilian status'' (Opp. at 9). But the district court expressly declined to find that Tiffany's failure to follow the flight plan was deliberate or that he was trying to evade detection. (Pet. App. at B-2).

those of countless other situations in which civilians are injured or killed as a consequence of military negligence. The purpose of the military is to provide for the national defense. It follows that almost all military operations serve national defense purposes, directly or indirectly. If the negligent violation of the Air Force's own safety regulations in the course of a peacetime identification of a civilian aircraft is constitutionally protected, there is no sound reason why other noncombatant military operations, including training missions or the operation of motor vehicles, should not be similarly protected.[2] Thus the conflict with the contrary decisions of three other circuits is real. Moreover, the court of appeals' failure to define the limits of protected military activities with any precision invites other courts to disrupt the law in this area further.

The alleged uniqueness of this situation is the keystone that holds together the other arguments in opposition to the petition. On examination, it is clear that these arguments must fail. The rationale of the court of appeals' decision is not that strange facts require strange law. The court of appeals simply declined to follow established law.

2. The Court of Appeals' Decision Is a Radical Departure From Prior Law.

In our Petition for Certiorari, we showed that the court of appeals' decision departs from prior law in three major respects. First, it extends the doctrine of nonjusticiability

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2. The circumstances here illustrate the difficulties of drawing any distinction between military operations that are nonjusticiable and those in which the military may be subject to suit. The interceptor that struck the Tiffany aircraft was not operated by career Air Force personnel, but rather by members of the Michigan Air National Guard who were assigned to NORAD for temporary duty. Clearly, one purpose of the assignment was to keep the pilots trained.

The line between the civilian arena and the military arena is similarly vague. At the time of the collision Henry Tiffany was flying in a location where civilian aircraft were permitted and had been communicating his intentions to air traffic control for nearly fifteen minutes. Yet the court of appeals obviously did not consider the collision to be an intrusion into the civilian arena.

beyond the policy sphere to embrace peacetime operational negligence against civilians in violation of regulations and procedures intended to protect civilian safety. (Pet. at 7-11.) Second, it abandons the well-defined discretionary function test as the measure of the Government's waiver of sovereign immunity in favor of a vague "separation of powers" analysis whose boundaries are wholly uncharted.[3] Third, it creates an exception for military liability that renders the "combatant activities" exception of the FTCA meaningless. (Pet. at 16-18.)

The Government takes serious issue only with the first of these contentions. The Government characterizes the court of appeals' decision as "well founded" in light of the limited precedents that the court of appeals cited to support its conclusion that the courts could not "assess the propriety of military operations." (Opp. at 8.) This observation is irrelevant because the "propriety" of the intercept was expressly not challenged. Petitioner did not question the decision to conduct the intercept. (Pet. at 4.) Instead, the negligence found by the district court involved the violation of regulations and established standards of care in the execution of the intercept, conceded by the Government's own expert. (Pet. at 5, n. 7.)

More significantly, the Government contends that the distinction between challenges to policy decisions and challenges to operational decisions is unimportant because courts have "specifically rejected the notion that the political question doctrine is limited to matters of policy as opposed to military operations." (Opp. at 11.) This position is unfounded. The two district court cases the Government cites involve combat situations where standards to govern the military's conduct were wholly lacking. Indeed, the underlying

3. The classic formulation of the separation of powers doctrine in *Baker v. Carr*, 369 U.S. 186, 217 (1962), quoted by the court of appeals at Pet. App. A-9, concerned a decision involving reapportionment in state legislatures. As we noted in our petition for certiorari, decisions of this Court that have discussed the doctrine have limited its application to circumstances involving challenges to military policy or planning, or intra-service matters involving servicemen's claims against the military or derivative claims. (Pet. at 9-10.)

principle quoted by the Government was that "courts lack standards with which to judge whether reasonable care was taken to achieve tactical objectives in combat while minimizing injury and loss of life." *Nejad v. United States*, 724 F. Supp. 753, 755 (C.D. Cal. 1989), *quoting Rappenecker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980).[4] In this case, by contrast, there were clear standards governing the conduct of the intercept. Furthermore, those standards were published to civilian pilots to enhance the safety of the intercept.[5]

The Government agrees that the court of appeals' decision is not premised on the application of the discretionary function exception, but rather that it "rested on different grounds." (Opp. at 14.) Indeed, the Government contends that the standards applied in *Berkovitz v. United States*, 486 U.S. 531 (1988) have no bearing here, because courts do not have the power to determine "which, if any, military directives give rise to tort duties in favor of potential plaintiffs." (Opp. at 15.)

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4. Because they involved combat situations, both *Nejad* and *Rappenecker* would have been subject to the exception of the FTCA for "combatant activities," 28 U.S.C. § 2680(j), to the extent that this exception is incorporated by implication into the Suits in Admiralty Act. Neither district court addressed this issue.

The Government also suggests that *In re Korean Air Lines Disaster of Sept. 1, 1983*, 597 F. Supp. 613, 616 (D.D.C. 1984), stands for the proposition that courts "have consistently declined to adjudicate those few cases, involving injuries to civilians, in which military operations have been called into question." (Opp. at 11). The suggestion is in error. The court in *Korean Air Lines* made reference to separation of powers principles in its determination that "the executive decision to conduct reconnaissance activity" and the "method and manner *of that decision*" were not subject to judicial review. *Id.* at 617 (emphasis added). But the court did not dismiss the plaintiffs' claims that "the existence of operational procedures governing the monitoring and warning of civilian aircraft" were potentially actionable. Instead, the court analyzed these claims in light of the discretionary function exception of the FTCA and concluded that further discovery was necessary before the claims could be resolved. *Id.* at 618. The claims were later dismissed for lack of evidence that "the government's incompetence worsened the position of the aircraft," and because the Soviet decision to shoot down the aircraft constituted a superseding cause of the accident. *In Re Korean Air Lines Disaster of Sept. 1, 1983*, 646 F. Supp. 30, 35 (D.D.C. 1986).

5. See Pet. at 5, n. 6.

The Government's position underscores the danger of the court of appeals' decision, which reverses nearly half a century of precedent. As we pointed out in our petition, this Court rejected the view that the "separation of powers" doctrine should apply to regulations governing government contractors in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), adopting, instead, the "federal policy" that these claims should be analyzed in light of the discretionary function exception of the FTCA. (Pet. at 7-9.) In *Berkovitz*, this Court held that the discretionary function exception of the FTCA did not bar claims for violation of Government regulations that allowed no exercise of policy discretion. In *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955) and *Rayonier, Inc. v. United States*, 352 U.S. 315, 318-19 (1957), this Court expressly rejected the argument that the Government was not immune from suit for its performance of "uniquely governmental functions." The Government now proposes that these decisions have no relevance to suits against the military involving activities touching national defense.

Finally, the radical nature of the Government's position is augmented by the Government's acknowledgment that the court of appeals' decision would vitiate the significance of the combatant activities exception of the FTCA, 28 U.S.C. § 2680(j).[6] The Government proffers no explanation to justify the narrow limitation of the combatant activities exception. Instead, it proposes that "The fact that Congress saw fit expressly to exclude claims involving combatant activities from the FTCA's waiver of sovereign immunity simply does not suggest that it considered all other claims involving the military to be justiciable." In short, the Government argues that the language chosen by Congress did not reflect the extent of the Government's waiver of sovereign immunity under the FTCA.

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6. The Government asserts that the application of the combatant activities exception is "irrelevant" because "the court of appeals did not suggest that the Federal Tort Claims Act forecloses petitioner's action." (Opp. at 15.) This assertion is misleading. Although the present action was brought under the Suits in Admiralty Act, 46 U.S.C. §§ 741-52, most tort suits against the military arise under the FTCA. The proper interpretation of the FTCA is therefore highly relevant.

It is clear that the Fourth Circuit's decision disrupts settled federal law involving important statutory and constitutional issues. This Court's intervention is needed to restore uniformity to the law and to carry out the intent of Congress.

Conclusion

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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